SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM—1967

No. 778

PROFESSIONAL EMPLOYEES OF I.T.T. FEDERAL LABORATORIES, a Division of International Telephone and Telegraph Corporation, WILLIAM P. LAPLANT, *et al.*, on behalf of themselves and all other persons similarly situated,

Petitioners,

v.

FRANK W. McCULLOCH, *et al.*, being the members of and constituting the National Labor Relations Board, and the NATIONAL LABOR RELATIONS BOARD, LOCAL 400, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, INTERNATIONAL TELEPHONE & TELEGRAPH FEDERAL LABORATORIES, a Division of International Telephone and Telegraph Corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM—1967

No. 773

PROFESSIONAL EMPLOYEES OF I.T.T. FEDERAL LABORATORIES, a division of International Telephone and Telegraph Corporation, WILLIAM P. LAPLANT, *et al.*, on behalf of themselves and all other persons similarly situated,

Petitioners,

vs.

FRANK W. MCCULLOCH, *et al.*, being the members of and constituting the National Labor Relations Board, and the NATIONAL LABOR RELATIONS BOARD, LOCAL 400, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, INTERNATIONAL TELEPHONE & TELEGRAPH FEDERAL LABORATORIES, a division of International Telephone and Telegraph Corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

Respondent, Local 400, International Union of Electrical, Radio & Machine Workers, AFL-CIO, hereinafter referred to as "Local 400", prays that the petition of petitioner,

Professional Employees of ITT Federal Laboratories, a Division of International Telephone and Telegraph Corporation, *et als.*, hereinafter referred to as "Professional Employees" for a writ of certiorari to review two judgments of the United States Court of Appeals for the Third Circuit in Case No. 16,012 entered August 31, 1967, affirming and enforcing an order issued by the National Labor Relations Board on June 29, 1966, and Case No. 15,609 rendered July 31, 1967, affirming a judgment of the United States District Court for the District of New Jersey issued March 29, 1965, be denied.

Counter-Statement of Questions Presented

1. Does the District Court have jurisdiction over the subject matter of an action to review a discretionary administrative determination of the National Labor Relations Board not to proceed with a decertification petition in the face of a pending unfair labor practice complaint alleging a refusal to bargain by the same employer in a recognized bargaining unit in which decertification is sought in a portion of said unit?

2. Is the decision of the Court of Appeals herein in conflict with the holding of this Court in *Leedom* v. *Kyne*, 350 U. S. 184 (1958)?

Counter-Statement of the Case

This is a companion case to *International Telephone and Telegraph Corporation* v. *NLRB* designated as Case No. 772, October Term, 1967, in which a petition for a writ of certiorari was docketed with the Court on October 30, 1967, simultaneous with the docketing of the petition in the instant case, which is designated Case No. 773. The essential facts relating to the bargaining history between Local 400 and respondent International Telephone and

Telegraph Federal Laboratories, a division of International Telephone and Telegraph Corporation, hereinafter interchangeably referred to as "ITT" or the "Company" are set forth in the reply to the petition for certiorari of said companion Case No. 772. There are additional facts pertinent to the instant case which are set forth herein.

During the course of the 1961-1964 collective agreement differences arose between ITT and Local 400 which resulted in the filing of unfair labor practice charges by Local 400 before the NLRB on June 19, 1964 (Exh. A annexed to Affidavit of Laird, Defendant's App. 10b, 11b).* On September 15, 1964, after investigation, the General Counsel of the NLRB issued a complaint against ITT, based on the Local 400 charge, alleging that ITT had failed to bargain with Local 400 in violation of the National Labor Relations Act. While awaiting a hearing on this complaint, a decertification petition was filed by professional employees on October 7, 1964, seeking to eliminate Local 400 as the bargaining agent of a portion of the "Engineer-Technician" unit, purportedly affecting "all professional employees including engineers in all categories, chemists in all categories, and spectroscopists in all categories . . ." (Exh. B annexed to Affidavit of Laird, pars. 5 and 6, Defendant's App. 5b, 12b, 13b).

On October 8, 1964, a new unfair labor practice charge was filed by Local 400 against ITT, which was amended on October 11, 1964, alleging additional unfair labor practices that had occurred since the filing of the original charge (Exhs. C and D annexed to Affidavit of Laird, par. 7, Defendant's App. 5b, 14b, 17b).

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* Reference to defendant's appendix herein is appendix of Local 400 annexed to Local 400's brief before the Court of Appeals. Reference to plaintiff's appendix herein is the appendix of Professional Employees filed with the Court of Appeals.

On October 30, 1964, the Regional Director of the NLRB dismissed the foregoing decertification petition upon the ground that the "petition involves an inappropriate unit" (Exh. E annexed to Affidavit of Laird, par. 6, Defendant's App. 19b). Professional employees' representative sought review of this action by filing a request for review thereof with the NLRB in Washington on November 17, 1964 (Affidavit of Laird, par. 8, Defendant's App. 5b, 18b, 19b).

On November 10, 1964, the General Counsel of the NLRB issued an amended complaint on the later charges and issued an Order consolidating both unfair practice cases for hearing. The amended complaint alleged that ITT had unlawfully refused to bargain with Local 400, by its refusal to bargain, had unlawfully prolonged a strike which had commenced on September 9, 1964, and had interfered with, restrained and coerced its employees in violation of the National Labor Relations Act (Affidavit of Laird, par. 9, Defendant's App. 5b, 6b).

On December 9, 1964, the Board sustained the Regional Director's dismissal of the decertification petition "in view of the pending unfair labor practice complaint . . . alleging that the employer (ITTFL) has violated Section 8(a)-(5) of the Act (refusal to bargain)" (Affidavit of Laird, par. 10, Defendant's App. 6b).

On December 16, 1964, a hearing was commenced before NLRB Trial Examiner Sidney Sherman on the amended and consolidated unfair labor practice complaints. When advised of the dismissal of the decertification petition, the Trial Examiner invited representatives of professional employees to intervene in said proceeding since the company's defense to said complaint, in part, denied it ". . . unlawfully refused to bargain with Local 400 respecting the engineers since the 'Engineer-Technician' unit alleged as appropriate in the amended complaint is an unlawfully con-

stituted unit", the same position taken by professional employees when they filed the decertification petition. Said opportunity to intervene was rejected by representatives of professional employees who advised that in lieu of intervening they intended to seek redress in the courts" (Affidavit of Laird, par. 11, Defendant's App. 6b).

In lieu of participating in the then pending NLRB hearings, professional employees instituted the within action on December 21, 1964 (Plaintiffs' App. 5a, 11a). The complaint alleged, in essence, that the unit combining engineers with technicians was inappropriate and, therefore, the NLRB should not have dismissed the decertification petition but should have directed an election in the unit requested in said petition. The complaint sought a mandatory injunction to declare the "Engineer-Technican" unit invalid and to compel the NLRB to direct an election based upon the decertification petition filed (Complaint, Plaintiff's App. 16a).

As heretofore noted, the appropriateness of the "Engineer-Technician" unit was one of the issues raised in the unfair labor practice proceedings.

On March 29, 1965, the District Court rendered an opinion dismissing the complaint for lack of jurisdiction. The court distinguished the case of *Leedom* v. *Kyne,* 385 U. S. 184 (1958) relied upon by professional employees as the basis for the relief sought, noting, *inter alia,* the pendency before the NLRB of the unit question raised in the District Court litigation and the availability of this forum to resolve the issues raised (Plaintiffs' App. 7a, 8a).

On April 6, 1965, the professional employees filed a petition with the NLRB seeking revocation of certification of Local 400 as the bargaining agent in the "Engineer-Technician" unt (Defendant's App. 20b, 24b).

On June 29, 1966, the Board rendered its decision in the then pending unfair labor practice proceeding in which it held, *inter alia,* that the company had violated Sections 8(a)(1) and (5) of the Act and dismissed the petition to revoke the certification as moot. The Court of Appeals in its opinion rendered July 31, 1967 affirmed the Board's decision as reflected in Case No. 772 herein, and affirmed the decision of the District Court in Case No. 773 the case at bar herein.

Reasons for Denying the Writ

1. The decision of the Court of Appeals in the within case, No. 773, was not in conflict with the holding of this court in *Leedom* v. *Kyne, supra.* The argument in support of such conclusion has been set forth in detail in the reply to petition for certiorari filed in Case No. 772 and we respectfully refer the court to said argument as it applies herein in lieu of burdening the court with a repetition of our contentions on this question.

2. The District Court is without jurisdiction over the subject matter of the action brought by the professional employees in the instant case and, therefore, it did not err in dismissing the complaint and the Court of Appeals did not err in affirming the order of the District Court.

As noted, the District Court dismissed the complaint seeking a mandatory injunction to compel the NLRB to proceed with the decertification petition and direct an election pursuant thereto. The Court distinguished the instant case from *Leedom* v. *Kyne, supra,* noting the narrow confines of this decision, the procedural limitations therein expressed, and the availability of a forum, the NLRB, to air the issues raised herein, which forum was established by Congress, and pursuant thereto had the expertise to decide the issue in controversy.

It is a basic rule that the Federal District Court lacks jurisdiction to review and set aside a Board decision in a representation case, except where the determination complained of clearly transgresses a mandatory direction of the act or violates constitutional protections. *Boire* v. *Greyhound Corp.*, 376 U. S. 473 (1964); *Boire* v. *Miami Herald Publishing Co.*, 343 F. 2d 17 (C. A. 5, 1965); *Milk and Ice Cream Drivers and Dairy Employees Union Local 98* v. *McCulloch*, 306 F. 2d 763 (C. A. D. of C. 1962); *Leedom* v. *IBEW*, 278 F. 2d 237 (C. A. D. of C. 1960); *International Association of Tool Craftsmen* v. *Leedom*, 276 F. 2d 514 (C. A. D. of C. 1960); *National Biscuit Division* v. *Leedom*, 265 F. 2d 101 (C. A. D. of C. 1959), cert. den. 359 U. S. 1011 (1959); *NLRB* v. *Burns*, 346 F. 2d 897 (C. A. 8, 1965); *Boire* v. *Miami Herald Publishing Co.*, 343 F. 2d 17 (C. A. 5, 1965). See also *Leedom* v. *Kyne, supra; McCulloch* v. *Sociedad National*, 372 U. S. 10 (1963); *Miami Newspaper Printing Pressmens Association, Local 46* v. *McCulloch*, 322 F. 2d 993 (C. A. D. of C. 1963). Conversely, the foregoing cases also establish that the District Courts may not review representation matters "in the wide area of determinations which depend on the Board's expertise and discretion. *International Association of Tool Craftsmen* v. *Leedom, supra.*

Professional employees emphasize that the Board's determination to dismiss the decertification petition because of the pendency of the unfair labor practice charges was improper, because of the claimed application of *Leedom* v. *Kyne, supra.* However, the administrative determination not to process the decertification petition at the time presented, in light of the pending unfair labor practice charges, fell within the "wide area of determinations which depends on the Board's expertise and discretion." *Tool Craftsmen, supra.* Moreover, one of the essential ingredi-

ents of *Kyne*, the lack of another forum to hear the issue, is absent in the instant case. The available forum was the NLRB in deciding the unfair practice complaint.

In *Suprenant* v. *Alpert*, 318 F. 2d 396 (C. A. 1, 1963) a suit for a mandatory injunction was brought to compel the Regional Director of the Board to process a representation case to completion which had been halted by application of the "blocking charge" doctrine. In considering the Board's "blocking charge" principle the court said:

> "There is no provision in the statute, or even any regulation, which expressly authorizes such action, but, concededly, the Board has followed this 'blocking charge' procedure from the beginning. *United States Coal & Coke Co.*, 1937, 3 NLRB 398; *Third Annual Report of the NLRB* (1939), 143. So far as we can discover it has never been judicially overturned. See e.g., *NLRB* v. *Auto Ventshade, Inc.*, 5 Cir., 1960, 276 F. 2d 303; *Pacemaker Corp.* v. *NLRB*, 7 Cir., 1958, 260 F. 2d 880; *NLRB* v. *Trimfit of California, Inc.*, 9 Cir., 1954, 211 F. 2d 206."

The court further noted that the control of election proceedings, including the determination of the steps necessary to conduct an election fairly, the timing of an election, what constitutes fair surrounding circumstances, etc., were matters entrusted by Congress to the Board alone. *Cf. NLRB* v. *Waterman Steamship Corp.*, 309 U. S. 206, 226 (1940); *NLRB* v. *Fresh'nd-Aire Co.*, 226 F. 2d 737 (C. A. 7, 1955); *NLRB* v. *Shirlington Supermarket, Inc.*, 224 F. 2d 649 (C. A. 4, 1955), cert. den. 350 U. S. 914; *NLRB* v. *Consolidated Machine Tool Corp.*, 167 F. 2d 470 (C. A. 2, 1948).

The court concluded that the Board's determination in *Suprenant* was one of discretion, subject to ordinary re-

view, as distinguished from the clear and mandatory statutory prohibition which the Board conceded it did not follow in *Leedom* v. *Kyne*. In conclusion the court said:

> "What appellant is asking is that the district court, in effect, supplant the Board's expertise. This cannot be done. *International Ass'n of Tool Craftsmen* v. *Leedom*, D. C. Cir., 1960, 276 F. 2d 514, cert. den. 364 U. S. 815; *Milk and Ice Cream Drivers Union Local 98* v. *McCulloch*, D. C. Cir., 1962, 306 F. 2d 763. It would seem almost elementary that appellant's claim of hardship must fall upon our deaf ears. *Myers* v. *Bethlehem Shipbuilding Corp.*, 1938, 303 U. S. 41."

Leedom v. *Kyne* is inapplicable to the instant case. In the instant case the Board has exercised its discretion within its jurisdiction as distinguished from entering an order in excess of its delegated powers and contrary to a specific prohibition of the statute. The "blocking charge" principle which is at the heart of the Board's determination to dismiss the petition, is not contrary to any clear, mandatory prohibition in the statute. Moreover, other means exist to effect review of the Board's final determination in the unfair practice proceeding under the review procedures specifically provided in the statute.

Professional employees contend that dismissal of the decertification petition foreclosed their right to be heard on the unit issue because they were not parties to the unfair practice proceedings. However, as conceded, they were offered an opportunity to intervene and participate in said proceeding as it related to the unit question. The decision not to participate was professional employees'. Although they may not have wanted to participate in the forum provided, it was available, and they cannot now complain that they were denied a right to be heard. The claimed appli-

cation of the 9(b)(1) proviso could have and should have been aired by the professional employees before the Board when the opportunity was offered to them by the Trial Examiner during the pendency of the unfair labor practice proceedings. Such participation would have enabled them to seek review of the Board's decision before the Court of Appeals under section 10(f) of the act, as an aggrieved person. See *Shoreline Enterprises of America, Inc.* v. *NLRB*, 262 F. 2d 933 (C. A. 5 1959).

Moreover, the professional employees were joined as respondents in the appeal from the Board's decision, were heard before the Court of Appeals on the argument, and have sought *certiorari* in said Case No. 772 in which they have argued their claim of application of *Leedom* v. *Kyne, supra.*

Accordingly, the very basis of the Court of Appeals affirmance of the District Court, the inapplicability of *Leedom* v. *Kyne, supra,* because of the availability of another forum is significantly appropriate herein.

Local 400 contends that the action instituted before the District Court was in effect an attempt to seek judicial review of the Board's decision to dismiss the decertification petition, which review is beyond the jurisdiction of the District Court, since the judicial forum may not be substituted for the administrative forum where the issue involved is the exercise of discretionary authority vested in the administrative tribunal. Moreover, since there was a forum available to litigate the unit question raised by the decertification petition, with the right of review in the courts after administrative determination, this was the forum that should have been pursued to litigate the unit issue and the District Court was without jurisdiction to entertain the complaint filed. Significantly, professional employees did litigate the unit issue in the Court of Appeals on the re-

view of the Board's decision in the unfair practice proceeding and has sought *certiorari* from this court to review the decision of the Court of Appeals which rejected professional employees contention as to the bargaining unit.

CONCLUSION

For the reasons heretofore set forth, Local 400 submits that the petition for the writ of certiorari herein should be denied.

Respectfully submitted,

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